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In the
Supreme Court of the United States

REGINA D. MCKNIGHT, *PETITIONER*,

v.

STATE OF SOUTH CAROLINA, *RESPONDENT*.

ON PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF SOUTH CAROLINA

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENT'S QUESTIONS PRESENTED

Whether application of South Carolina's homicide by child abuse statute to the Petitioner based on the *in utero* death of her viable child from Petitioner's use of crack cocaine violates due process?

Whether South Carolina's homicide by child abuse is void for vagueness as applied to the Petitioner?

Whether application of South Carolina's homicide by child abuse statute to the Petitioner based on the *in utero* death of her viable child from Petitioner's use of crack cocaine violates Petitioner's right to privacy?

Whether the standard of review applied by the South Carolina Supreme Court is consistent with constitutional principles?

Whether application of South Carolina's homicide by child abuse statute to the Petitioner based on the *in utero* death of her viable child from Petitioner's use of crack cocaine constitutes cruel and unusual punishment?

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STATEMENT OF THE CASE

In 1960, the South Carolina Supreme Court held that a viable fetus is a "person" under South Carolina law, and if injured *in utero*, could sustain a civil action after birth for those injuries. In 1984, the Court held that a viable fetus is a "person" under South Carolina's statutory criminal law regarding offenses against persons (Title 16, Chapter 3 of the South Carolina Code of Laws).

In 1992, the South Carolina Legislature enacted S.C. Code §16-3-85, making it a felony to kill a child under the age of eleven while committing child abuse or neglect under circumstances manifesting extreme indifference to human life ("homicide by child abuse"). As originally enacted, the statute referenced provisions of the statutory Children's Code, specifically S.C. Code §20-7-490, which defines "child abuse or neglect" and "harm."

In 1997, consistent with South Carolina's well established jurisprudence, the South Carolina Supreme Court held that for purposes of the criminal abuse provisions of the Children's Code, a viable fetus is a "child," and a mother can be held criminally responsible for injuries inflicted on the "child" *in utero* through the ingestion of crack cocaine. In 1998, the Court again addressed the status of a viable fetus in criminal cases, and held that a viable fetus is a "person" and a "child" for purposes of the statutory crime of murder, and the aggravating circumstances delineated as grounds for imposing the death penalty.

In May 1999, the Petitioner Regina D. McKnight ("McKnight") was transported by ambulance to the Conway Hospital in Conway, South Carolina. It was readily apparent that McKnight was pregnant with a close to term fetus, and within

several hours, she gave birth to a stillborn daughter.[1] (R., pp. 130-132, 140-151).[2]

McKnight's urine sample tested positive for cocaine. Analysis of a second urine sample taken after the baby's birth revealed the presence of the cocaine metabolite benzoylecgonine. (R., pp. 155, 223)

An autopsy of the child revealed that she was at least thirty-four weeks gestational age at the time of her death, and would have been capable of surviving separate and apart from her mother. It also revealed the presence of benzoylecgnine in her blood. (R., pp. 107-114).

Due to the presence of cocaine in McKnight's system when she gave birth, and the *in utero* death of her child, hospital personnel contacted the S.C. Department of Social Services ("DSS") as required by South Carolina's child abuse reporting laws. When a DSS child protective services investigator met with McKnight several days later, McKnight admitted she had known she was pregnant, and she had used crack cocaine on a regular basis while pregnant. (R., pp. 317-320).

McKnight was subsequently charged with homicide by child abuse in connection with the *in utero* death of her child. Prior to trial, she moved to dismiss the charge, asserting 1) the homicide by child abuse statute did not encompass stillbirths; 2) there was no evidence of malice; 3) prosecuting her under the statute was cruel and unusual punishment under the Eight Amendment because she was being prosecuted for her status as

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[1]McKnight already had three children, who were living with relatives.

[2]References are to the Record on Appeal before the South Carolina Supreme Court.

a drug addict and a pregnant woman, and the punishment was disproportionate to the crime; 4) prosecuting her under the statute violated due process because she did not have notice she could be prosecuted; 5) prosecuting her under the statute violated her privacy rights under the Fourteenth Amendment; 6) prosecuting her under the statute violated her right to equal protection under the Fourteenth Amendment; and 7) there was no evidence indicating that her prenatal use of cocaine caused the baby's *in utero* death. (R., pp. 4-36, 41-44, 60-69). The trial court denied the motion on all grounds, and the matter was called for a jury trial in May 2001. (R., pp. 69-70).

The pathologist ("Dr. Proctor") testified at trial that McKnight's child was viable at the time of her death, which occurred *in utero* approximately one to three days prior to her birth. There was inflammation in the umbilical cord (funisitis) and placenta (chorioamnionitis), however, there was no active inflammatory process in the child herself that would account for her death, and most children with those type of inflammations are born alive. (R., pp. 111, 113-117, 125-126)

Dr. Proctor stated that the presence of benzoylecgonine in the child's blood indicated the child had cocaine in its system prior to death, and that the cocaine could only have come from McKnight's use of the drug. He testified that in and of itself, cocaine can cause death. Dr. Proctor determined that the child's death was a consequence of the chorioamnionitis, the funisitis, and McKnight's cocaine use, and ruled the death a homicide. (R., pp. 110-114, 119-123).

Another expert ("Dr. Woodard") testified that he reviewed the available medical records and the autopsy results, and agreed that McKnight's child was viable at the time of her death. He stated that cocaine can cause significant heart problems, including rhythm disorders and blood pressure increase, which can cause

congestive heart failure, and that the affects of the drug on an *in utero* child are essentially the same as what can happen to the mother taking the drug. In addition, cocaine can affect the placenta by causing the maternal blood vessels to squeeze down, which interferes with the flow of oxygen and nutrients to the child. (R., pp. 266-277).

Dr. Woodard stated that the level of benzoylecgnonine in McKnight's child indicated a "significant exposure before the child's death," and there were degenerated areas of the placenta that were consistent with cocaine exposure. He also testified that certain of the autopsy findings indicated the presence of extra fluid in the child's organs, which was consistent with congestive heart failure. (R., pp. 279-284, 289-295)

Dr. Woodard testified that to a reasonable degree of medical certainty, the chorioamnionitis and funisitis did not contribute to the child's death. He further testified that to a reasonable degree of medical certainty, intauteric cocaine exposure was the cause of death, most probably through cardiac and placental functions, and he concluded that the child would have survived absent McKnight's ingestion of crack cocaine. (R., pp. 285-287).

At the close of the State's case, McKnight moved for a directed verdict on the ground that the State had failed to present sufficient evidence to warrant submitting the case to the jury. The trial court denied the motion, finding there was "substantial" evidence for the case to proceed. (R., pp. 322-23).

McKnight presented an expert ("Dr. Conradi"), who testified the funisitis was actually healing when the child died, and therefore, it had nothing to do with the death. She also testified that while chorioamnionitis can lead to fetal death, the death will result from the fetus developing an infection from the

infected placenta. Dr. Conradi stated there was no evidence that McKnight's child had any such infection, and therefore, it was unlikely the chorioamnionitis contributed to the child's death. (R., pp. 333-340, 344, 354-355).

Dr. Conradi agreed that the child was viable at the time of her death, and that the presence of benzoylecgonine in the child's blood indicated cocaine was in the child's system at some point prior to her death. She also agreed that even one dose of cocaine can be fatal. but stated she could not conclude to any degree of medical certainty what caused the child's death in this case. (R., pp. 341-345, 349, 355-357)

The trial court instructed the jury that the State was required to prove beyond a reasonable doubt that McKnight caused the death of a child under the age of eleven while committing child abuse or neglect, and that the death occurred in circumstances showing extreme indifference to human life. It also instructed the jury that the State was required to prove criminal intent beyond a reasonable doubt, and that criminal intent could arise from actions or failure to act, negligence, recklessness, or indifference to duty or the consequences thereof. McKnight did not object to the jury instructions as given, or request any additional instructions regarding the elements of the offense, burden of proof, or intent. (R., pp. 369-380).

During deliberations, the jury requested a definition of criminal intent. With McKnight's agreement, the trial court repeated the previous instruction regarding criminal intent. McKnight did not object to the instruction as given, or request additional instructions. (R., pp. 381-383).

McKnight was convicted of homicide by child abuse, and sentenced to twenty years incarceration, suspended upon service of twelve years. (R., pp. 384, 391). She appealed her conviction

and sentence, contending 1) the trial court erred in denying her motion for a directed verdict based on insufficient evidence regarding the cause of death, criminal intent, and viability; 2) the trial court erred in denying her motion to dismiss on the ground that the homicide by child abuse statute did not apply; 3) application of the statute in her case violated her due process right to adequate notice of what constitutes criminal behavior; 4) application of the statute to women who give birth to stillborn fetuses violates women's constitutional rights to privacy, bodily integrity and liberty; 5) application of the statute in her case constituted cruel and unusual punishment; 6) application of the statute in her case violated her Fourteenth Amendment right to equal protection; and 7) the trial court erred in denying her motion to exclude certain evidence.

By opinion filed January 27, 2003, the South Carolina Supreme Court affirmed McKnight's conviction and sentence.[3] The Court held that viewing the evidence in the light most favorable to the State, there was sufficient evidence as to cause of death and criminal intent, which reasonably tended to prove McKnight's guilt, or from which her guilt could be fairly and logically deduced, and therefore, the trial court properly submitted the case to the jury. (Pet. App., pp. 3a-8a).[4]

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[3]Justice Moore, joined by Justice Pleicones, dissented on essentially the same statutory interpretation grounds set forth in Justice Moore's dissent in *Whitner v. State*, 328 S.C. 1, 492, S.E.2d 777, 787 (1997), *cert. denied*, 523 U.S. 1145 (1998), and his concurrence in *State v. Ard*, 332 S.C. 370, 505 S.E.2d 328 (1998). (Pet. App., pp. 21a-22a).

[4]The Court held that the viability issue was not preserved for appellate review. (Pet. App., p. 8a). In any event, all the experts, including Dr. Conradi, agreed that the child was viable at the time of her death. (R., pp. 111, 272-73, 357).

The Court also held that given the law in South Carolina holding that the term "child" includes a viable fetus, the plain language of the homicide by child abuse statute encompasses a viable fetus. In addition, the Court held that in light of the South Carolina cases holding that a viable fetus is a "person" for legal purposes, and particularly that ingesting crack cocaine while pregnant with a viable fetus constitutes criminal child abuse, McKnight had ample notice that ingesting crack cocaine while pregnant with a viable fetus, with the drug's well known adverse effects on fetuses, would subject her to criminal sanctions. (Pet. App., pp. 8a-13a).

The Court held that any issue as to McKnight's individual right to privacy was decided by *Whitner v. State*, 328 S.C. 1, 492 S.E.2d 777 (1997), *cert. denied* 523 U.S. 1145 (1998). As to McKnight's policy arguments against prosecuting pregnant women who engage in conduct that harm their viable fetuses, the Court held she did not have standing to assert the privacy rights of other pregnant women since the statute was clearly applicable to her case. (Pet. App., pp. 14a-15a).

The Court also held that application of the homicide by child abuse statute in McKnight's case did not violate the Eighth Amendment prohibition of cruel and unusual punishment. The Court found that the gravity of the offense (homicide) was severe, the penalty imposed (twenty years incarceration suspended on service of twelve years) was no more severe than sentences imposed on any other individuals charged with murder (death, life imprisonment, or mandatory minimum of thirty years imprisonment), and other states impose severe sentences on those found guilty of the murder or neglect of a child.[5] (Pet. App., pp. 15a-16a).

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[5]The Court noted that other states have not yet defined a viable fetus as a child for purposes of criminal prosecution of the mother.

The Court found that McKnight's equal protection argument based on application of the homicide by child abuse statute to her as opposed to persons charged under South Carolina's criminal abortion statute was not preserved for appellate review in that it was not raised to and ruled on by the trial court. Rather, the equal protection grounds McKnight asserted at trial were premised on the statute's applicability to women, and its disparate impact on women.[6] (Pet. App., pp. 16a-17a).

On May 27, 2003, McKnight submitted a Petition for Writ of Certiorari in this Court, which was docketed on May 30, 2003.

REASONS FOR DENYING THE PETITION

When it enacted the homicide by child abuse statute, the South Carolina Legislature was well aware of South Carolina jurisprudence holding that a viable fetus is a "person" for legal purposes, including the homicide laws. The Legislature re-visited the statute in 2000, three years after the South Carolina Supreme Court held that a viable fetus is a "child" for purposes of the criminal child abuse statute, and two years after the Court held that a viable fetus is a "person" and a "child" under South Carolina's criminal law, specifically Title 16, Chapter 3 of the South Carolina Code of Laws. In the face of that case law, which had been widely publicized locally and nationally, the Legislature made no effort to exclude viable fetuses from application of the homicide by child abuse statute, which is located in Title 16, Chapter 3. Consequently, rather than constituting an aberrant "expansion" of the statute, application of this statute to McKnight

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[6]The Court also held that the trial court properly admitted the results of the urine sample taken after the stillbirth. (Pet. App., pp. 17a-21a). That issue is not raised in the Petition for a Writ of Certiorari, and therefore, is not before this Court.

was logical, foreseeable, and well within the statute's legislative intent.

This is not simply a case involving a tragic stillbirth that occurred through no fault of the mother. On the contrary, the evidence established a direct link between McKnight's ingestion of crack cocaine, which she had no legally protected right to do, and her child's *in utero* death.[7] Nor was McKnight prosecuted simply because she is a drug addict. Rather, she was prosecuted and convicted because she continued to ingest crack cocaine after she knew she was pregnant, and as a result, her child died when it could have survived separate and apart from McKnight.

Without doubt, when McKnight became pregnant, it was well established that under South Carolina law, a mother can be criminally prosecuted for "child abuse" if she ingests cocaine that harms her viable fetus, and a viable fetus is a "person" and a "child" for purposes of the "homicide" laws. Therefore, if McKnight's ingestion of cocaine resulted in the death of her viable fetus, she had ample notice that she could be criminally prosecuted for homicide by "child abuse" under existing South Carolina law.

Contrary to McKnight's contentions, the South Carolina Supreme Court's construction of the homicide by child abuse statute does not permit "pervasive State regulation of pregnant women," or impermissibly infringe on a woman's constitution rights. Rather, it simply recognizes the well established principle that once a woman makes the choice to carry her pregnancy to term, and the fetus becomes viable, the State has a compelling

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[7]As the South Carolina Supreme Court noted, any dispute with the State's expert testimony on this issue went to the weight of the evidence, which McKnight was free to, and did, challenge with her own evidence. (Pet. App., p. 5a).

interest in protecting the child's life, and South Carolina law protects the child from abuse and death as a result of the woman's decision to ingest cocaine. While the fact that other states have failed to take such steps to protect viable fetuses may make South Carolina's decision to do so novel, it does not make it unconstitutional, or mandate that this Court intervene.

I. Application of South Carolina's Homicide by Child Abuse Statute in the Instant Case Did Not Conflict with this Court's Due Process Decisions.

A. Application of the Statute Was Clearly Foreseeable under Existing South Carolina Jurisprudence.

McKnight asserts that application of the homicide by child abuse statute in her case was "'unexpected and indefensible," and violated due process because no state had previously convicted a woman of homicide by child abuse when she contributed to the baby's stillbirth. Her contention is based on the mistaken premise that the South Carolina Supreme Court's decision constituted an "expansion" of the homicide by child abuse statute, and the mere fact that other states have thus far declined to undertake similar prosecutions.

When considered in the context of South Carolina jurisprudence, however, application of the statute in this case was neither "unexpected" nor "indefensible." On the contrary, it was logical, foreseeable, and amply supported by well established law.

In 1960, the South Carolina Supreme Court held that a viable fetus is a "person" under South Carolina law, and if injured *in utero*, the child can sustain a civil action after birth for those injuries. *Hall v. Murphy*, 236 S.C. 257, 113 S.E.2d 790 (1960). The Court recognized the lack of South Carolina precedent for its

holding, but found that not allowing a child to maintain an action after its birth was illogical and unjust. Id. at 793.

In 1964, the Court reiterated its holding that a viable fetus is a "person," and found that since the viable child is a "person" before separation from its mother's body, a cause of action for tortious *in utero* injuries to the child arises immediately upon infliction of the injuries, and recovery for the injuries may be had even if the child is stillborn. *Fowler v. Woodward*, 244 S.C. 608, 138 S.E.2d 42 (1964). "'The cause of action arose at the time of the injury and we see no more reason why it should be cut off because of the child's death before birth, than if it died thereafter.'" Id. at 45 (quoting *State v. Sherman*, 234 Md. 179, 198 A.2d 71 (1964)).

Finding it would be "grossly inconsistent" to construe a viable fetus as a "person" for civil liability while refusing a similar classification in the criminal context, the South Carolina Supreme Court held in 1984 that a viable fetus is a "person" within South Carolina's statutory definition of murder. *State v. Horne*, 282 S.C. 444, 319 S.E.2d 703 (1984).[8] Acknowledging there was no prior South Carolina case holding that killing of a viable human being *in utero* could constitute criminal homicide, the court reversed the defendant's voluntary manslaughter conviction, but stated that the law of feticide would apply to all future cases. Id. at 704.

In the face of South Carolina case law including a viable fetus within the statutory definition of "person" in homicide statutes, in 1992, the South Carolina Legislature enacted S.C. Code §16-3-85, making it a felony to kill a child under the age of

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[8]The Court was construing S.C. Code §16-3-10 (1976), which defines "murder" as the killing of any "person" with malice aforethought. 319 S.E.2d at 704.

eleven while committing child abuse or neglect under circumstances manifesting extreme indifference to human life (homicide by child abuse). *See Merrill Lynch v. Curran*, 456 U.S. 353, 379 (1982) (in construing a statute, court assumes that elected representatives know the law, and are familiar with judicial decisions construing comparable language) (internal citations omitted); *State v. Corey D.*, 339 S.C. 107, 529 S.E.2d 20 (2000) (when legislature enacts statutes, there is a presumption it has knowledge of previous legislation on related subjects, and judicial decisions construing that legislation). As originally enacted, the statute referenced provisions of the Children's Code, specifically S.C. Code §20-7-490, for the definition of "child abuse or neglect," but not for the definition of "child."[9]

In 1997, consistent with South Carolina's well established jurisprudence, the South Carolina Supreme Court held that for purposes of the Children's Code criminal abuse provisions, a viable fetus is a "child," and a mother can be held criminally responsible for injuries inflicted on the "child" *in utero* through the ingestion of crack cocaine. *Whitner v. State*, 328 S.C. 1, 492 S.E.2d 777 (1997), *cert. denied* 523 U.S. 1145 (1998). Citing South Carolina's "long" history of recognizing that "viable fetuses are persons holding certain legal rights and privileges," the Court stated: "we do not see any rational basis for finding a viable fetus is a not a 'person' in the [context of the child abuse statutes]. Indeed, it would be absurd to recognize the viable fetus as a person for purposes of homicide laws and wrongful death statutes but not for purposes of statutes proscribing child abuse." Id. at 780 (emphasis added); *see also Ferguson v. City of*

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[9] The Children's Code defines a "child" as "a person under the age of eighteen," and makes it a felony to harm a child through abuse and/or neglect. S.C. Code §§20-7-50 & -490 (Supp. 2002) (emphasis added). Thus, the Children's Code reference to "child" encompasses the definition of a "person," which under *Horne*, includes a viable fetus.

Charleston, 121 S.Ct. 1281, 1284 n. 2 (2001) ("Under South Carolina law, a viable fetus has historically been regarded as a person; in 1995 the South Carolina Supreme Court held that the ingestion of cocaine during the third trimester constitutes child neglect.").[10] Noting that under *Roe v. Wade*, 410 U.S. 113 (1973), and its progeny, states have a compelling interest in the life of a viable fetus, the Court expressly declined to insulate the mother from all culpability for harm to her viable child. *Whitner*, 492 S.E.2d at 783.

In 1998, the South Carolina Supreme Court again addressed the status of a viable fetus in criminal cases, and held that a viable fetus is a "person" and a "child" for purposes of the statutory crime of murder, and the aggravating circumstances delineated as grounds for imposing the death penalty. *State v. Ard*, 332 S.C. 370, 505 S.E.2d 328 (1998). Noting that when it enacted the statutory provisions at issue, the Legislature was aware of the case law holding that a viable fetus is a "person" under the murder statute, the Court stated: "it would be absurd to hold a viable fetus is a 'person' but not a 'child.'" Id. at 331.

In 1998, against this backdrop of South Carolina case law regarding the homicide and criminal child abuse statutes, McKnight became pregnant and made the choice to carry her child to term, but continued to ingest crack cocaine throughout her pregnancy. Her cocaine use resulted in the child's death in 1999, and she was charged with homicide by child abuse.

Before McKnight's case was tried, the South Carolina Legislature amended the homicide by child abuse statute in

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[10]The *Whitner* and *Ferguson* cases were widely reported in the local and national media, and have been the subject of numerous law journal articles.

2000.[11] The amendment deleted the reference to the Children's Code definitions of abuse and neglect, and put the relevant definitions directly in the homicide by child abuse statute.[12] The Legislature did not, however, change the reference to "child," or make any effort to exclude viable fetuses from the definition of a "child" for purposes of the statute's application.[13]

Thus, as amended, the statute still applies to a "child under the age of eleven," which includes viable fetuses. (Pet. App., pp. 24a-25a). The Legislature's failure to exclude viable fetuses in light of the existing case law amply demonstrates the

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[11]The parties agreed at trial that the amended statute would apply to McKnight's case. (R., pp. 442-43).

[12]McKnight's contention that deleting the Children's Code reference demonstrates the legislative intent not to include a viable fetus as a "child" under §16-3-85 is unavailing. Initially, legislative intent is an issue more appropriately determined by the state court. *See Bell v. Maryland*, 378 U.S. 226, 240 (1964). In any event, with the Children's Code reference in the statute, prosecution under §16-3-85 was limited to a parent, guardian, or other person responsible for the child's welfare. Without that reference, however, the statute encompasses anyone who kills a child by child abuse, without regard to their relationship with the child. Thus, the amendment was intended to expand the statute's scope, not limit its applicability to a viable fetus.

[13]McKnight's contentions regarding other legislative proposals considered by the S.C. Legislature are misleading and irrelevant. There are a myriad of reasons, many unrelated to the subject matter itself, why proposed legislation is not enacted, including the possibility that existing statutes provide adequate mechanisms to address the issue. The Legislature's failure to enact proposed legislation about maternal drug use does not indicate an intent to exclude a viable fetus from the homicide by child abuse statute, or to preclude application of the statute to pregnant women who kill their unborn, viable children by ingesting cocaine. Rather, the Legislature could well have determined that the proposed legislation was unnecessary because the abuse reporting laws, combined with the criminal child abuse and homicide by child abuse statutes, adequately address issues involving maternal drug use.

accuracy of the South Carolina Supreme Court's statutory construction analysis in McKnight's case.

McKnight contends that the existence of South Carolina's criminal abortion statute, S.C. Code §44-41-80 (2002),[14] mandates the conclusion that applying the homicide by child abuse statute in her case violates due process. Initially, McKnight did not raise this due process issue before the South Carolina Supreme Court. Rather, she asserted only that applying the homicide by child abuse statute to her in the face of the criminal abortion statute violated her equal protection rights by treating indifferent conduct more harshly than intentional conduct, and that it constituted cruel and unusual punishment (See Issue II below). Therefore, the issue of whether the existence of the criminal abortion statute somehow deprived McKnight of notice that she could be prosecuted under the homicide by child abuse statute was not presented to the South Carolina Supreme Court, and is not properly before this Court. *See Durley v. Mayo*, 351 U.S. 277, 281 (1956) (particular federal issue must have been presented to the highest state court, and been necessary to that court's decision, before the Supreme Court will review the state court decision); *Stembridge v. Georgia*, 343 U.S. 541, 546 (1952) (where the highest court of the state was not asked to decide the particular constitutional issue, the United States Supreme Court has no occasion to consider it); *Bailey v. Anderson*, 326 U.S. 203, 206 (1945) (the United States Supreme Court does not have jurisdiction to decide issues that were not raised to and ruled on by the state court in the course of the proceedings).

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[14]This statute provides that any women who solicits or procures any drug, medicine, prescription or substance, and administers it to herself with the intent to produce an abortion not otherwise permitted by law, is guilty of a misdemeanor punishable by up to two years in prison and a $1000 fine.

In any event, the existence of the criminal abortion statute is irrelevant to the issue of whether McKnight had sufficient notice that she could be prosecuted under the homicide by child abuse statute. As discussed above, in *Horne*, *Whitner*, and *Ard*, the South Carolina Supreme Court gave clear and unequivocal notice that a woman commits homicide if she kills her viable fetus by ingesting crack cocaine. *After* those opinions were issued, McKnight became pregnant, and ingested crack cocaine during her pregnancy to induce her own personal euphoria, without regard or concern for its effect on her child.[15] When her viable child died as a result of McKnight's cocaine use, she was clearly subject to prosecution for homicide by child abuse under well established South Carolina law.

Rather than indicate that the S.C. Legislature did not intend §16-3-85 to impose criminal liability on mothers who kill their viable fetuses by ingesting crack cocaine, the existence of the criminal abortion statute readily demonstrates the Legislature's willingness to hold mothers criminally responsible for harming their viable unborn children. Significantly, the Legislature passed §16-3-85 in the face of case law specifically holding that South Carolina's homicide laws encompass viable fetuses. Since §16-3-85 is a homicide statute, the clear implication is that the Legislature intended to include the killing of a viable fetus by child abuse within the statute's scope.[16]

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[15]McKnight contends that her grief after the child was stillborn indicates her concern for the child's welfare. Virtually every parent is grief stricken at the death of a child, even those who physically beat the child to death, or allow the child to starve. Post-mortem grief does not prove concern for the child before its death, or mitigate the parent's role in causing that death.

[16]The mere fact that the criminal abortion statute provides for a misdemeanor conviction with a two year sentence, while the homicide by child abuse statute provides for life imprisonment, does not lead to the conclusion that the latter statute is unconstitutional. Harmelin v. Michigan, 501 U.S. 957,

All states, including South Carolina, have the sovereign right to make decisions regarding the protection of their citizens' health and welfare. The mere fact that other states have yet to protect viable fetuses from the harmful effects of their mother's ingestion of crack cocaine does not render South Carolina's efforts to do so unpredictable, or more importantly, unconstitutional under the Due Process Clause. *See Rubin v. Coors Brewing Co.*, 514 U.S. 476, 486 (1995) (one state's decision to permit brewers to disclose alcohol content on beer labels does not preclude neighboring states from effectively banning the disclosure of such information within their borders); *Harmelin*, 501 U.S. at 989-90 (opinion of Scalia, J.) (a state is entitled to criminalize acts that other states do not, and some state will always bear the distinction of treating particular offenders more severely than any other state). McKnight had ample notice that she was subject to criminal sanctions in South Carolina if her ingestion of crack cocaine injured her child, and as the South Carolina Supreme Court noted, she had all the notice she was constitutionally entitled to receive.[17]

988-89 (1991) (opinion of Scalia, J.) (when two offenses that appear to be "similarly grave" have significantly different penalties, the harsher penalty is not unconstitutional; rather, the legislature merely did not consider the offenses to be similarly grave). There is enormous variation, "even within a given age, not to mention across the many generations ruled by the Bill of Rights," in legislative determinations of what offenses are more serious than others. Id. at 987.

[17]McKnight's argument that the South Carolina Supreme Court's construction of the "extreme indifference to human life" element of the offense violated due process because it was "unprecedented" and "indefensible," was not presented to the South Carolina Supreme Court, and therefore, is not properly presented here. *See Durley*, 351 U.S. at 281(particular federal issue must have been presented to the highest state court, and been necessary to that court's decision, before the Supreme Court will review the state court decision). The only issue McKnight raised in the South Carolina courts regarding the "extreme indifference" element was sufficiency of the evidence to establish that she acted with extreme

B. Petitioner Does Not Have Standing to Challenge the Statute as Void for Vagueness.

McKnight also argues that the South Carolina Supreme Court's construction of the homicide by child abuse statute rendered the statute void for vagueness. In support of this argument, McKnight takes the Court's holding out of context, and ignores the undisputed facts of this case on which the Court's holding was specifically based.

The first fallacy in McKnight's argument is her contention that the South Carolina Supreme Court broadly interpreted the statute to authorize punishment for any "pregnancy activity" known to be potentially fatal to the fetus. On the contrary, rather than interpret the statute as applying to "pregnancy activity" in general, the Court specifically stated only that in light of the *Whitner* decision, "the statute clearly applies to a stillbirth caused by ingestion of cocaine." (Pet. App., pp. 13a-14a).

The fact that the statute might be interpreted to apply to other behaviors is irrelevant to a void for vagueness analysis when the instant conduct falls squarely within the "hard core" of the statute's application. *Broadrick v. Oklahoma*, 413 U.S. 601, 608 (1973). "Embedded in the traditional rules governing constitutional adjudication is the principle that a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before

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indifference to human life. (Final Brief of Appellant, pp. 14-17). She never contended the statutory language was unconstitutionally vague, nor did she seek a rehearing on this issue. Further, rather than being "unprecedented" and "indefensible," in construing the language at issue in this case, the South Carolina Supreme Court specifically relied on South Carolina precedents construing similar mental states, and its conclusion was consistent with that precedent. (Pet. App. pp. 5a-8a).

the Court." Id. at 610; *see also Parker v. Levy*, 417 U.S. 733, 755-56 (1974) (a defendant who is squarely within the terms of a statute as stated by the enacting body, or as authoritatively construed, does not have standing to challenge the vagueness of the statute even though the statute's hypothetical application to other behavior is uncertain); *Curtis v. State*, 345 S.C. 557, 549 S.E.2d 591, 576 (2001), *cert. denied* 535 U.S. 926 (2002) (a defendant does not have standing to challenge the constitutionality of a statute on the ground that it invades the constitutional rights of others).

McKnight sets forth the same "parade of horribles" asserted in the *Whitner* case, and makes dire predictions regarding hypothetical prosecutions based on conduct ranging from work-related chemical exposure to failing to take prenatal vitamins. As in *Whitner*, McKnight's "parade of horribles" and hypothetical cases are simply irrelevant since her conduct was clearly within the type of conduct contemplated by the statute.[18] *See* Janssen, *Fetal Rights and the Prosecution of Women for Using Drugs*

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[18]McKnight's dire predictions of massive prosecutions against pregnant women who give birth to stillborn infants are seriously undermined by the fact that there have been very few such prosecutions in South Carolina in the nineteen years since *Horne* was decided, the eleven years since §16-3-85 was enacted, the six years since *Whitner* was decided, the two years since McKnight was tried and convicted, or the six months since the South Carolina Supreme Court affirmed her conviction. In short, such "pregnancy police" predictions are "unrealistic at best." Schueller, *The Use of Cocaine by Pregnant Women: Child Abuse or Choice?*, 25 J. Legis. 163, 174-75 (1999) (hereinafter "*Use of Cocaine*"). The strength of a "parade of horribles" argument is directly proportionate to the certainty that the constitutional provision was meant to exclude the very evil represented by the imagined parade; and the probability that the parade will in fact materialize. *Harmelin*, 501 U.S. at 986 n. 11 (opinion of Scalia, J.). Even assuming the Due Process Clause was meant to exclude prosecution in the various situations of McKnight's "parade of horribles," the parade she proposes simply has not materialized in South Carolina.

During Pregnancy, 48 Drake L. Rev. 741, 763 (2000) (hereinafter "*Fetal Rights*") (law does not have capacity to treat all behaviors that may produce a particular result the same, and the mere fact that some bad behaviors are beyond reach of the legal system does not mean society should not seek to punish those that are within the system's reach).

McKnight's contention that the statute is void for vagueness because it authorizes and encourages arbitrary enforcement was not presented to the South Carolina Supreme Court, and therefore, is not properly before this Court. *See Durley*, 351 U.S. at 281 (particular federal issue must have been presented to the highest state court, and been necessary to that court's decision, before the Supreme Court will review the state court decision). In any event, McKnight's argument fails because on its face, the homicide by child abuse has very explicit requirements for prosecution which significantly limit prosecutorial discretion.[19]

First, contrary to McKnight's assertion that the homicide by child abuse statute encompasses acts or omissions with known "*potential*" to result in stillbirth, the statute expressly requires an act or omission "which causes harm to the child's physical health or welfare." (Pet. App., p. 24a) (emphasis added).[20] Thus, the mere "potential" for harm is insufficient, and there must be evidence of actual harm to the child from the acts or omissions at issue.

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[19]The effect of these limitations in connection with prosecutions against pregnant women under the statute is amply demonstrated by the small number of such prosecutions in South Carolina. *See* n. 17 above.

[20]The reference is to the statute as amended in 2000, which the parties agreed at trial would apply to this case. (R., pp. 442-443).

Second, the harm to the child must have been caused by by "circumstances manifesting extreme indifference to human life." As construed by the South Carolina Supreme Court, this *mens rea* element requires evidence of a "mental state akin to intent characterized by a deliberate act culminating in death," "indifference to the consequences of one's acts," "a conscious failure to exercise due care or ordinary care, or a conscious indifference to the rights and safety of others or a reckless disregard thereof." (Pet. App., pp. 6a-7a)(citations omitted). The *mens rea* requirement readily distinguishes the statute from the legislation at issue in *City of Chicago v. Morales*, 527 U.S. 41 (1999) (ordinance that subjected people to criminal liability for loitering without regard to their intent was void for vagueness because it vested virtually all authority in the police to determine what activities constituted loitering).

Finally, in cases involving a stillbirth, the State must prove that the child was viable at the time of its *in utero* death. This will require medical expert testimony regarding the child's stage of development, and whether the child could have lived separate and apart from its mother.

McKnight had sufficient notice that her ingestion of crack cocaine could subject her to criminal prosecution if it caused harm to her child, and the explicit elements of the homicide by child abuse statute provide sufficient guidance to law enforcement to preclude arbitrary prosecution of mothers simply because their children are stillborn. Therefore, the statute is not void for vagueness.

C. Application of the Statute in this Case Did Not Violate Substantive Due Process.

In a poorly disguised attempt to bring the abortion controversy into this case, McKnight contends that applying the

homicide by child abuse statute in her case violates her substantive due process right to procreate and carry her pregnancy to term. The fallacy of this argument is clear.

Under *Roe v. Wade* and its progeny, the State of South Carolina has a compelling interest in protecting the life of a viable child. *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 870-71 (1992) (*Roe* established that at the point of viability, the state's right to protect the child overrides the rights of the woman); *Webster v. Reproductive Health Services*, 492 U.S. 490, 519 (1989) (state has interest in protecting potential human life); *Roe v. Wade*, 410 U.S. 113, 162-63 (1973) (state has important and legitimate interest in preserving and protecting the potentiality of life, which grows in substantiality as the woman approaches term, and at a point it becomes "compelling"). On the contrary, McKnight has no fundamental right, or even protectable interest, to use crack cocaine, either before, during, or after her pregnancy.

McKnight made a conscious decision to carry her child to term, and then continued to ingest crack cocaine which directly caused her viable child's death. Having exercised her right to procreate, and decided to carry the child to term, McKnight assumed certain duties and obligations to her child, and the State's interest in protecting the child once it reached viability was clearly paramount to McKnight's non-existent right to ingest crack cocaine.[21] *See State v. McKnight*, Pet. App., p. 11a (having made the choice to have the child, the mother must accept the duties and obligations to the child arising from her choice, and if she fails to fulfill those obligations, the state must step in to

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[21]McKnight's attempt to couch the issue in terms of regulation of the all prenatal activities is unavailing. The sole issue in this case is the State's interest in protecting a viable child from harm caused by the mother's ingestion of cocaine.

prevent harm to the child); *Fetal Rights*, 48 Drake L. Rev. at 762 (once mother has made the choice to have a child, she must accept the consequences and obligations that her choice creates).

McKnight advances the policy argument that fear of prosecution will deter pregnant drug users from seeking prenatal care or drug treatment. Initially, such policy issues are better addressed to the legislature. *See Ewing v. California*, 123 S.Ct. 1179, 1187 (2003) (plurality opinion) (Court has a longstanding tradition of deferring to state legislatures in making and implementing important policy decisions); *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 524 (1959) (policy decisions are for the legislature).

Further, there is no evidence that fear of prosecution after *Whitner*, when the possibility of criminal prosecution for causing harm to a viable child through the use of crack cocaine was established beyond any doubt, has caused pregnant drug users in South Carolina to avoid prenatal care or drug treatment.[22] More

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[22]The *amicus* parties before the South Carolina Supreme Court contended that the *Whitner* decision caused a decline in admissions to substance abuse treatment programs and an increase in South Carolina's infant mortality rates. (Brief *Amici Curiae* of the South Carolina Medical Association, et al., pp. 34-35). As support for this contention, however, they presented nothing more than an undocumented inference that *Whitner*, rather than other societal factors, caused those occurrences. *See Fetal Rights*, 48 Drake L. Rev. at 764 (impact of fear of imprisonment on obtaining prenatal care may be exaggerated, and no direct causative link has been established); *Use of Cocaine*, 25 J. Legis. at 171-74 (deterrent effect of prosecuting pregnant drug users for harming their viable fetuses is impossible to accurately calculate, while harmful effects of maternal drug abuse are certain); Coady, *Extending Child Abuse Protection to the Viable Fetus: Whitner v. State of South Carolina*, 71 St. John's L. Rev. 667, 687 (1997) (the reality is that crack addicts do not put a priority on getting medical care for their unborn children, and reasons other than fear of prosecution may prevent them from seeking proper medical care). Further, assuming that pregnant drug users in South Carolina have decided to forego prenatal care because of the *Whitner* decision

importantly, there is no evidence that McKnight herself made any effort to get drug treatment, even though she knew she was pregnant, or that she did not seek treatment due to a fear of prosecution.[23]

As evidenced by the *amici* briefs submitted in the South Carolina Supreme Court, law enforcement officials are well aware there are drug treatment centers in South Carolina. If the State wanted to prosecute any pregnant drug user simply because she is a drug user, those centers would be a ready source of defendants. The fact that the State has not initiated such proceedings reveals that it has no interest in prosecuting a pregnant drug user who actively seeks treatment for her drug problem, and attempts to get proper prenatal care to prevent her drug use from harming her unborn child.[24]

The State's compelling interest in protecting a viable child from harm is well established. Application of the homicide by child abuse statute to mothers who kill their unborn, viable children by ingesting cocaine legitimately furthers the State's interest, and is well supported by due process jurisprudence.

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conclusively undermines McKnight's contention she did not have adequate notice that she could be prosecuted for harm caused to her child by her drug use.

[23]The only reference to drug treatment was defense counsel's assertion at sentencing that McKnight had been homeless since she started using drugs, and she "really didn't have access to , or the ability to be in a real drug program that would have assisted." (R. p. 388). There is absolutely no evidence that McKnight ever tried to get help for her drug use.

[24]Rather than pose a deterrent to prenatal care, the fact that the State has not sought to prosecute pregnant drug users who seek treatment and prenatal care should serve as an incentive to such women, and encourage them to seek help.

D. The South Carolina Supreme Court Applied an Appropriate Standard of Review.

McKnight also contends that the South Carolina Supreme Court applied an unconstitutional standard of review in affirming her conviction. She argues that the Court used an "any evidence" standard, rather than a standard requiring evidence that could reasonably support a finding of guilt "beyond a reasonable doubt."

As a threshold matter, this issue is not preserved for review by this Court. In her brief to the South Carolina Supreme Court, McKnight cited South Carolina cases for the standard of appellate review in criminal cases, and did not assert that South Carolina's standard of review was unconstitutional. (Final Brief of Appellant, pp. 8-9). After the opinion was issued affirming her conviction, McKnight did not seek rehearing on the ground that the standard of review used by the South Carolina Supreme Court violated due process.

When the highest state court has failed to decide a federal question, it will be assumed that the omission was due to the party's failure to properly present the question in the state courts. *Exxon Corp. v. Eagerton*, 462 U.S. 176, 181 n. 3 (1983) (citing *Fuller v. Oregon*, 417 U.S. 40, 50 n. 11 (1974)); *see also Durley*, 351 U.S. at 281 (before the United States Supreme Court will review a decision of a state court, it must affirmatively appear from the record that the particular federal issue was presented to the highest court of the State, and that its determination of the federal question was necessary to its decision). Nothing in the record in this case indicates that any issue regarding the constitutionality of South Carolina's standard of review in criminal cases was presented to, or decided by, the South Carolina Supreme Court. Thus, this Court does not have jurisdiction to consider this issue.

In any event, the standard of review applied by South Carolina's appellate courts is consistent with *Jackson v. Virginia*, 443 U.S. 307 (1979). *Jackson* held that when reviewing a criminal conviction, the appellate court must determine whether in viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. 443 U. S. at 319. While the South Carolina Supreme Court did not use the precise language "beyond a reasonable doubt" in connection with its standard of review, that requirement is clearly encompassed in the standard applied.

In South Carolina, a defendant is entitled to a directed verdict of acquittal when the State fails to produce evidence "of the offense charged," and the evidence must do more than raise a suspicion of guilt. *State v. McHoney*, 344 S.C. 85, 544 S.E.2d 30 (2001); *State v. Mitchell*, 341 S.C. 406, 535 S.E.2d 126, 127 (2000). On appeal, the reviewing court must view the evidence in the light most favorable to the State, and determine if there is any direct evidence, or substantial circumstantial evidence, reasonably tending to prove the defendant's guilt, or from which his guilt may be fairly and logically deduced. *E.g., State v. Lollis*, 343 S.C. 580, 541 S.E.2d 254, 256 (2001); *State v. Pinckney*, 339 S.C. 346, 529 S.E.2d 526 (2000).

Contrary to McKnight's contention, the standard of review applied by the South Carolina Supreme Court is not an "any evidence" standard. If such were the case, evidence that raises nothing more than a "suspicion" of guilt would be sufficient. Rather, the requirement that the evidence be sufficient to "reasonably" tend to "prove" the defendant's "guilt," or from which his "guilt" may be "fairly and logically" deduced, implicitly incorporates the "beyond a reasonable doubt" component of the *Jackson* standard. *See State v. Robinson*, 310 S.C. 535, 426 S.E.2d 317, 319 (1992) (a finding that the evidence

reasonably tends to prove the defendant's guilt means that any rational trier of fact could have found all the elements of the crime beyond a reasonable doubt) (citing *Jackson*); *State v. Hudson*, 277 S.C. 200, 285 S.E.2d 773, 775 (1981) (there was evidence from which a reasonable trier of fact could conclude beyond a reasonable doubt that the defendant possessed heroin with intent to distribute) (citing *Jackson*).

II. Application of South Carolina's Homicide by Child Abuse Statute in this Case Does Not Constitute Cruel and Unusual Punishment.

McKnight contends her punishment in this case constitutes cruel and unusual punishment, because every other jurisdiction that has considered the question would not treat her conduct as a criminal offense. McKnight also argues that since she could have received a maximum two year sentence for the "same harm" caused to the viable fetus by intentionally terminating her pregnancy, this calls into question the merits of the South Carolina Supreme Court's reasoning to uphold her greater sentence for "indifference" to a viable fetus, which McKnight asserts is less culpable.

The Eight Amendment does not require strict proportionality between the crime and the sentence imposed, and forbids only extreme sentences that are "grossly disproportionate" to the crime. *Ewing v. California*, 123 S.Ct. at, 1186-87 (plurality opinion) (citing *Harmelin*, 501 U.S. at 1001, opinion of Kennedy J., concurring in part and concurring in judgment). Intrajurisdictional and interjurisdictional comparisons are only appropriate when a threshold comparison of the crime committed and the sentence imposed leads to an inference of "gross disproportionality." *Harmelin*, 501 U.S. at 1005 (opinion of Kennedy, J., concurring in part and concurring in the judgment); *see also State v. Brannon*, 341 S.C. 271, 533 S.E.2d 345 (Ct.

App. 2000) (court need only do a threshold comparison of the gravity of the offense against the severity of the sentence). Reviewing courts "should grant substantial deference" to the legislature's broad authority in determining the types and limits of punishments for crimes. *Harmelin*, 501 U.S. at 999 (opinion of Kennedy, J.).

In this case, McKnight was charged with homicide by child abuse of her unborn child. As the South Carolina Supreme Court correctly noted, McKnight's potential penalty was no harsher than that imposed on any other individual charged with murder. (Pet. App., p. 15a).

Although other states have not yet defined a viable fetus as a child for purposes of criminal prosecution of a pregnant mother, many states do impose severe sentences on those guilty of neglect or murder of a child. (Pet. App., p. 16a). The mere fact that South Carolina stands alone in protecting a viable fetus from death resulting from its mother's illegal drug use does not render its decision to do so cruel and unusual punishment. *Harmelin*, 501 U.S. at 989-90 (opinion of Scalia, J.) (state may criminalize acts that other states do not, and some state will always bear the distinction of treating certain offenders more severely than any other state).

McKnight's argument that her punishment for homicide by child abuse was unconstitutional when compared to the misdemeanor treatment of the intentional termination of a pregnancy is also unavailing. Initially, the South Carolina Supreme Court found that this issue was procedurally barred under South Carolina law because it was not specifically raised in the trial court. (Pet. App., pp. 16a-17a). *See, e.g.*, *In re McCracken*, 346 S.C. 87, 551 S.E.2d 235 (2001)(a constitutional claim must be raised and ruled on in the trial court to be preserved for appellate review). Since the state procedural bar is

independent of the constitutional question presented, and adequately supports the South Carolina Supreme Court's decision, this Court should not consider the issue. *Ulster County Court v. Allen*, 442 U.S. 140 (1979).

In any event, every difference in punishment among criminal statutes is not subject to constitutional scrutiny. As developed in South Carolina law, the homicide by child abuse statute encompasses abusive conduct that results in a child's death, including the death of a viable fetus. McKnight's ingestion of crack cocaine that caused her child's *in utero* death fell squarely within the conduct proscribed by that statute.[25]

Determining sentencing rationales is generally a policy choice to be made by state legislatures. *Ewing*, 123 S.Ct. at 1187 (plurality opinion). Such policy determinations may change over time in light of changing societal norms. *See Harmelin*, 501 U.S. at 987-88 (opinion of Scalia, J.) (determination of what offenses are more serious vary enormously within a given age and across generations). The tradition of giving great deference to legislative policy decisions regarding criminal sentences recognizes the myriad of factors inherent in making those decisions. *See Ewing*, 123 S.Ct. at 1187 (plurality opinion) (citations omitted).

McKnight's Eighth Amendment argument is premised on a comparison of incomparable statutes, and the decisions of other states that are irrelevant. A twenty year sentence is not constitutionally excessive for the crime of homicide, and thus, there is no inference of "gross disproportionality" that would give rise to intrajurisdictional or interjurisdictional comparisons, and McKnight's sentence was not cruel and unusual.

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[25]McKnight's conduct did not fall within the express statutory elements of South Carolina's abortion laws. Therefore, she could not have been prosecuted under those laws.

CONCLUSION

Based on the foregoing, there are no issues in this case that warrant review by this Court, and the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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